No. 49505-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JOSHUA WEYTHMAN-BAKER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 15-1-00366-6

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court allowed a deputy sheriff to testify that, during the investigation of the instant case, the deputy arrested the defendant on an unrelated arrest warrant. The State contends that the trial court's ruling was not error because evidence of the arrest warrant merely allowed the deputy to explain why the arrest occurred before completion of the investigation, and in any event, even if the testimony was error it was harmless

2. During entry of judgment and sentence, Weythman-Baker conceded that he has the ability (as distinct from the current means) to pay legal financial obligations imposed by the trial court. The State contends that the trial court did not err by relying upon Weythman-Baker's concession when imposing mandatory and discretionary costs.

3. Weythman-Baker avers that this Court should exercise its discretion and decline to award appellate costs to the State in the event that the State is the substantially prevailing party. The State answers that this Court should award appellate costs to the State if the State is the substantially prevailing party because there is no evidence in the record to suggest that Weythman-Baker lacks the *ability* pay these costs and because the evidence that is in the record shows that Weythman-Baker in fact has the *ability*, even if not the present means, to pay these costs.

B. FACTS AND STATEMENT OF THE CASE

On August 16, 2015, deputies with the Mason County Sheriff's Office went to 150 E. Budd Drive in Mason County to investigate a burglary. RP 1, 28, 51, 64-65. The homeowner discovered the burglary

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after returning home from his honeymoon and finding that his car, his gun safe with numerous guns, and other items were missing from his home. RP 109. An investigation led to the house next door at 170 E. Budd Drive.

The house at 170 E. Budd Drive was in foreclosure, and the prior owners had already vacated the residence. RP 68, 76. After the foreclosure, however, Benjamin Betsch, who was the son of the prior owners, began living in the house illegally. RP 141. Betsch invited others, including the defendant, Joshua Weythman-Baker, to live illegally in the house with him. RP 141. Weythman-Baker lived in one of the back bedrooms of the house. RP 154-55, 161-62.

When police approached the house at 170 E. Budd Drive, they heard voices in the garage. RP 76. So, police told the occupants to come out. RP 76. One occupant emerged, but police believed that at least one other person was still inside the foreclosed home. RP 76-77. So, after repeated unheeded warnings for the occupants to come out of the house, police released a police dog to search the house. RP 77-78. The police dog found Weythman-Baker hiding in the closet in the back bedroom and apprehended him. RP 77-78. Police found a handgun with extra ammunition and found the keys to the stolen car in the closet where Weythman-Baker was hiding. RP 80. Police discovered that Weythman-

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Baker had an outstanding warrant for his arrest; so, a sheriff's deputy arrested Weythman-Baker on the warrant. RP 83.

After the burglary investigation was completed, the State in a 13 count information charged Weythman-Baker with residential burglary, unlawful possession of a firearm in the first degree, possession of a stolen motor vehicle, possession of stolen property in the second degree, trafficking in stolen property in the first degree, bail jumping, and seven counts of possession of a stolen firearm. CP 138-43. At trial, the burglary victim testified and described in detail the property stolen from him in the burglary. RP 109-32. Betsch testified and detailed Weythman-Baker's involvement in the burglary. RP 137-70. After receiving the evidence, the jury returned guilty verdicts on all counts. CP 57-69.

C. ARGUMENT

1. The trial court allowed a deputy sheriff to testify that, during the investigation of the instant case, the deputy arrested the defendant on an unrelated arrest warrant. The State contends that the trial court's ruling was not error because evidence of the arrest warrant merely allowed the deputy to explain why the arrest occurred before completion of the investigation, and in any event, even if the testimony was error it was harmless.

During the trial, near the end of the testimony of Deputy Cotte (the officer that arrested Weythman-Baker), the prosecutor asked the following

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question: "Why'd you arrest Mr. Baker?" RP 83. Defense counsel objected. RP 83. The court excused the jury from the courtroom while the parties argued the objection. RP 83. Without citing any particular evidence rule, defense counsel argued that the elicited testimony was not probative, that it was unduly prejudicial, and that it was substantially more prejudicial than probative. RP 84.

When ruling on the objection, the trial court judge gave the following explanation:

> The Court does consider this type of evidence under Rule 403. There's no question that this is relevant evidence because it gives a basis for the arrest of Mr. Weythman-Baker. The issue is whether it is unduly prejudicial, as opposed to just prejudicial.
>
> In looking at this in the totality, I do not believe that excluding this evidence unduly prejudices – or by not excluding this evidence, unduly prejudices Mr. Weythman-Baker. It does provide the accurate basis, or at least this witness's perception of the accurate basis, for the arrest.
>
> So the Court is going to overrule the objection, allow the testimony that does explain the rationale at the time. Now the court is going to sustain in part if it goes beyond the point of there was an outstanding warrant.
>
> I do not believe that it would be appropriate to go into any further details as to the basis of the warrant or anything further.

RP 86. The jury returned to the courtroom, and the judge overruled the objection. RP 87.

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With Deputy Cotte back on the witness stand, the prosecutor then asked the question again, as follows:

> Q Deputy Cotte, did you arrest Mr. Weythman-Baker?
> A Yes, we did.
> Q And why'd you do it at that time?
> A At that time he had a warrant out for his arrest.
> [Prosecutor]: Thank you. I have no further questions.

RP 88. Thus, the context of the prosecutor's question shows that the prosecutor wished to explain why Weythman-Baker was arrested "at that time" before the investigation was completed. *Id.*

Traditionally, our courts have recognized a "res gestae" or "same transaction" exception to the admission of other crimes or bad acts evidence. *See, e.g., State v. Lane*, 123 Wn.2d 825, 831, 889 P.3d 929 (1995). If the trial court finds that the res gestae evidence is relevant for a purpose other than showing propensity and finds that it is not unduly prejudicial, then the evidence is admissible irrespective of whether the res gestae evidence is relevant for yet another purpose, such as opportunity, plan, motive or identity. *Id.* at 834.

Here, the State contends that evidence of the mere existence of a warrant was not prejudicial – nor was it unduly prejudicial. The mere existence of a warrant does not, per se, specify or imply a bad act or a crime. Still more, during the trial (in conjunction with the State's case in

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chief) Weythman-Baker chose to stipulate to the fact that he had a prior conviction for a serious crime, and with his agreement the court read the following stipulation to the jury:

> This is a document entitled Stipulation as to Prior Conviction. The parties herein stipulate that for the purposes of the crime of unlawful possession of a firearm in the first degree, as charged in Count IX, the defendant, Joshua M. Weythman-Baker, has previously been convicted of a serious offense.

RP 180. Thus, the State contends that in light of the above stipulation, the mere existence of an arrest warrant was of no consequence whatsoever.

However, there is no indication in the record that the arrest of Weythman-Baker led to or explained the discovery of any relevant evidence. In other words, there is nothing in the record to indicate that further evidence was discovered during a search incident to arrest, that Weythman-Baker gave a statement after his arrest, or that the fact of his arrest otherwise explains any fact of importance in the case. Therefore, arguably, the fact of his arrest could have been entirely omitted from the testimony without changing the case. However, the State contends that the mere fact of the existence of a warrant does not in any measure show a propensity to commit a crime of any kind, and particularly it does not show a propensity to the commit the kinds of crimes that were at issue in this case. Still more, other than Deputy Cotte's testimony that he arrested

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Weythman-Baker because he had a warrant for his arrest, RP 88, the State made no further reference to the warrant or the arrest and did not mention it in closing argument. RP 222-34, 245-50. It appears that the only further mention of the warrant was from the defense, who used the existence of the warrant as an exculpatory fact to explain why Weythman-Baker hid in the close rather than to surrender to officers. RP 242.

Thus, the State contends, even if the court wrongfully admitted evidence of the warrant, the error was harmless because "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) (where an evidentiary error is not of constitutional magnitude, reversal is required only if there is a reasonable probability that the error materially affected the outcome of the trial).

The State contends that in consideration of the circumstances of the instant case, it is improbable that the mention of the arrest warrant affected the outcome of the trial, because: 1) the mere mention of an arrest warrant is not likely to have affected, much less to have *materially* affected, the outcome of the trial; 2) the mere mention of an arrest warrant

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was of little significance given that Weythman-Baker stipulated to the fact that he had a prior conviction for a serious crime (RP 180); 3) the defense argued that the existence of the warrant was an exculpatory fact that explained Weythman-Baker's act of hiding in the closet rather than surrendering to police (RP 242); 4) the mere existence of the warrant was never argued, or even suggested, to be propensity evidence, and in fact the prosecutor did not even mention the warrant during closing argument (RP 122-34, 245-50); and, 5) the existence of the warrant merely explained the reason why officers arrested Weythman-Baker before having completed the investigation (RP 88).

In conclusion, the error, if any, was harmless because it cannot be said "that 'within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Grier*, 168 Wn. App. 635, 278 P.3d 225 (2012), *quoting State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

2. During entry of judgment and sentence, Weythman-Baker conceded that he has the ability (as distinct from the current means) to pay legal financial obligations imposed by the trial court. The State contends that the trial court did not err by relying upon Weythman-Baker's concession when imposing mandatory and discretionary costs.

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Weythman-Baker argues that the trial court erred by ordering him as a part of the judgment and sentence to pay legal financial obligations without first assessing his ability to pay. Br. of Appellant at 17-19. However, Weythman-Baker raises this claim of error for the first time on appeal. In fact, rather than preserve this claim of error by first raising an objection in the trial court, Weythman-Baker actually stipulated to the legal financial obligations at the time of sentencing by conceding that he does, in fact, have the *ability* to pay the legal financial obligations. RP 280. Specifically, rather than raise an objection on the issue of legal financial obligations, Weythman-Baker's attorney candidly informed the court as follows: "I do agree as to the fines, fees and court costs... that he doesn't have any physical or mental disabilities that would prevent him from employment, with the exception of his addiction." RP 280. Immediately thereafter, Weythman-Baker confirmed the accuracy of his attorney's representation. *Id.*

The trial court imposed the following mandatory fees: 1) a $500.00 crime victim fee under RCW 7.68.035; 2) a $200.00 filing fee under RCW 36.18.020(2)(h); and, 3) a $100.00 DNA fee under RCW 43.43.7541. CP 34; RP 287. Because these fees are mandatory, irrespective of the depth of the court's inquiry into Weythman-Baker's ability to pay them, the trial

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court did not err by imposing them. *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620 (2016); *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

The trial court also imposed the following discretionary fees: 1) $47.00 witness fee; 2) $918.00 sheriff's return of service fees; 3) $250.00 jury fee; 4) $600.00 court-appointed attorney fee; and, 5) $60.00 bench warrant fee. CP 34; RP 287. The State contends that the trial court should be permitted to rely on Weythman-Baker's stipulation that he possesses the *ability* to pay these costs – particularly in the absence of any evidence to the contrary. But in any event this Court should decline to review this claim of error because Weythman-Baker, besides inviting the claim of error with his stipulation in the trial court, also failed to preserve the issue for appeal. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015).

3. Weythman-Baker avers that this Court should exercise its discretion and decline to award appellate costs to the State in the event that the State is the substantially prevailing party. The State answers that this Court should award appellate costs to the State if the State is the substantially prevailing party because there is no evidence in the record to suggest that Weythman-Baker lacks the *ability* pay these costs and because the evidence that is in the record shows that Weythman-Baker in fact has the *ability*, even if not the present means, to pay these costs.

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Weythman-Baker cites *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), to support his proposition that "[a]n appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay." Br. of Appellant at 21. However, although it may be inferred that because Weythman-Baker had court-appointed counsel at trial, he is therefore indigent, there nevertheless is no evidence or facts from which to infer that he lacks the *ability* to pay appellate costs. To the contrary, the record supports a finding that Weythman in fact has the ability to pay, because he and his attorney candidly conceded this point. RP 280. Accordingly, the State asks that this Court exercise its discretion under RCW 10.73.160(1) and RAP 14.2 and allow appellate costs in the event that the State is the substantially prevailing party on appeal and in the event that the State then requests appellate costs.

D. CONCLUSION

For the reasons argued above, the State asks this Court to deny Weythman-Baker's appeal and to sustain the trial court convictions in this case. Additionally, the State asks the Court to sustain the trial court's judgment and sentencing imposing mandatory and discretionary costs and

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to allow the State to seek appellate costs in the event that the State is the substantially prevailing party on appeal.

DATED: June 13, 2017.

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